

BRYNN K. DAVIS

VS.

Respondent

AND

Insurance Carrier

Whether claimant suffered a work-related injury is a jurisdictional issue that is listed in K.S.A. 1996 Supp. 44-534(a) and subjects a preliminary hearing order to review by the Appeals Board.

(1) Claimant requested preliminary compensation benefits in the form of medical treatment for a right foot injury. Claimant injured her right foot while working for the respondent on November 27, 1996. Claimant testified that on the date of the injury she was employed by the respondent as a sales clerk. Claimant testified she had walked upstairs from her department to an office to make a copy of a credit card security plan she had sold to a customer. As claimant was leaving the office, she testified she felt a pop in her right foot accompanied by a sharp pain. She continued to walk to her department on the lower floor. After she arrived downstairs, she immediately reported the incident to the respondent.

The following day, claimant went on her own to the Mt. Oread Medical Arts Centre in Lawrence, Kansas. She was seen by Michael Geist, M.D., who diagnosed claimant with a right fifth metatarsal fracture. Dr. Geist placed claimant in a splint and on crutches to avoid weight bearing. Claimant returned to Dr. Geist on December 1, 1996, and at that time he referred her to her personal physician, J. S. Walia, M.D., in Topeka, Kansas. Dr. Walia then referred claimant for further treatment to Phillip L. Baker, M.D., an orthopedic surgeon, in Topeka, Kansas. Claimant saw Dr. Baker on two occasions, April 8 and April 17, 1997. At the preliminary hearing, claimant testified she had a future appointment with Peter S. Lepse, M.D., a physician associated with Dr. Baker, for the purpose of discussing surgery on her right foot. The claimant denied that she had any problems or injuries to her right foot before this incident.

The Administrative Law Judge found claimant had proved that her right foot injury arose out of and in the course of her employment with the respondent. Respondent was ordered to provide claimant with medical treatment for the injury through Dr. Baker and any referrals therefrom. The respondent also was ordered to pay all past medical treatment as authorized treatment for claimant's right foot injury.

The respondent agrees that claimant's right foot injury occurred in the course of her employment but denies that the injury arose out of her employment. For an injured worker to be entitled to compensation, the worker must prove that both of these conditions exist. See *Siebert v. Hoch*, 199 Kan. 299, 303, 428 P.2d 825 (1967). The injury arises "out of" the employment if the cause or origin of the accident has some causal connection between the accident and the employment. See *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, Syl. ¶ 4, 899 P.2d 1058 (1995).

The respondent cites *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980), as a case with similar facts that supports its position that claimant's injury did not arise out of the employment relationship with the respondent. The *Martin* court noted that work-place hazards may be analyzed in three categories of risk: (1) those directly associated with the employment; (2) those personal to the worker; and, (3) neutral risks that are neither associated with the employment nor personal to the worker. Risks associated with the employment are compensable, whereas personal risks are not compensable. The worker in *Martin* had a history of back problems and alleged he injured his back when he exited his truck while at work. The Court of Appeals held that a worker's preexisting back condition was a risk personal to the worker and any everyday activity would have a tendency

to aggravate his condition. The court concluded this was a risk that was personal to the worker and, therefore, not compensable. 5 Kan. App. 2d at 299-300. The respondent argues that in the present case there is no evidence in the record that establishes that a risk associated with the employment caused claimant's injury and thus claimant's injury is not compensable.

The Appeals Board disagrees with the respondent's reliance on the Martin case as support for its argument that the claimant's injury is not compensable. There is no evidence in the preliminary hearing transcript or medical records attached thereto that claimant had a previous history of right foot problems before she injured her foot at work. Therefore, the claimant in this case did not have preexisting problems that would constitute a personal risk to her as determined in Martin. The Appeals Board concludes that since claimant's injury was not caused by a personal risk and the injury occurred while claimant was in the performance of her regular work duties, then the injury has a causal connection with her employment. Thus, the Appeals Board finds that claimant's injury is compensable and affirms the preliminary hearing Order of the Administrative Law Judge.

(2) The respondent also questions the Administrative Law Judge's authority to appoint a health care provider to treat claimant's injury. The Appeals Board has had other opportunities in the past to address this particular issue. The Appeals Board has consistently found that the Administrative Law Judge, pursuant to the preliminary hearing statute, K.S.A. 1996 Supp. 44-534a, has the authority to award medical compensation. Medical compensation includes the appointment of an authorized physician to treat an injured worker. Accordingly, the Appeals Board does not have jurisdiction at this juncture of the proceeding to review this issue.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Floyd V. Palmer dated May 14, 1997, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

c: Brynn K. Davis, Topeka, KS
Mark E. Kolich, Kansas City, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director